No. 631

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IN THE

Supreme Court of the United States

BENJAMIN E. COHEN, et al.,
Petitioners,

vs.

ISAAC C. FORCHEIMER,
Plaintiff and Respondent,

LEONARD A. YOUNG, ALICE D. COFFIN, CHARLES M. YOUNG, L. A. YOUNG SPRING & WIRE CORPORATION, AMERICAN STEEL & WIRE COMPANY OF NEW JERSEY,
Defendants and Respondents,

LUCILLE K. LEVY, MARIANNE L. FISHER, ROSALIE B. SPERRY, and JOSEPHINE YANKAUER,
Interveners and Respondents.

On petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth District

BRIEF IN BEHALF OF ISAAC C. FORCHEIMER, PLAINTIFF AND RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This was a stockholders' class suit filed in the District Court of the United States for the Eastern District of

Michigan by Isaac C. Forcheimer, a stockholder of L. A. Young Spring & Wire Corporation in behalf of himself and all other stockholders of the corporation against L. A. Young, president, and others, to recover certain sums of money and property, set aside certain transactions, and for other relief. It was a secondary or derivative action as defined in Rule 23(b) of the Rules of Civil Procedure because the corporation refused to enforce rights which might properly be asserted by it.

In the course of the trial before the Hon. Arthur F. Lederle, District Judge, a compromise and settlement was proposed providing for payment to the corporation of $275,000.00 in cash, transfer to the corporation of twelve valuable patents and patent applications, and for cancellation of a royalty agreement between Young and the Corporation. Counsel for plaintiff and interveners were convinced that any judgment against L. A. Young personally would be uncollectible, and that the compromise and settlement would be more beneficial to the corporation and its stockholders than an uncollectible judgment against L. A. Young.

Notice of the proposed compromise and settlement was given to all the stockholders as directed by the District Court in accordance with Rule 23(c). After notice and full hearing, the District Court entered an order approving the compromise and settlement June 23, 1940. Benjamin E. Cohen, a stockholder and petitioner's decedent, who objected to the settlement, appealed to the Sixth Circuit Court of Appeals.

THE DECISION ON THE FIRST APPEAL

The Appellate Court reversed the District Court (*Cohen v. Young*, 127 Fed. (2) 721) holding that proper exercise of judicial discretion under Rule 23(c) of the Rules of Civil Procedure required the District Court to personally examine the statements of L. A. Young and of the auditors on which the attorneys who recommended the settlement relied. It was the mandate of the court that—

> "subject to the control of the court properly exercised * * * appellant (Benjamin E. Cohen) be permitted to go forward with evidence limited to the single subject of the solvency of Young."

THE PROCEEDINGS WHICH FOLLOWED

Thereafter on May 21st, 1942, the attorneys who represented Benjamin E. Cohen, the original objector, filed a motion, petition and a proposed complaint (T. 6-23) in behalf of certain stockholders asking leave to file objections to the proposed compromise and settlement, to intervene, add parties defendant, and to file their complaint. Objections to the motion and petition (T. 24-34) were filed by respondent and other parties to the action because the procedure was neither timely, necessary nor proper, and was an attempt by petitioners to evade the decision of the Appellate Court which had denied like petitions by orders entered January 10th, 1942, and April 14th, 1942.

The District Court permitted counsel for Benjamin E. Cohen to file objections to the proposed settlement by order entered June 23, 1942 (T. 34). Decision on the petition for intervention and for leave to file the proposed complaint was reserved pending determination of the question whether L. A. Young was insolvent.

THE HEARING PURSUANT TO MANDATE

Pursuant to the mandate of the Appellate Court, the District Court heard and received all evidence relating to the solvency of Young offered by the parties and their counsel. Benjamin E. Cohen and his counsel were afforded every opportunity to cross examine the witnesses and to produce evidence in support of their many claims and contentions that the compromise and settlement should not be approved. Before taking proofs there were discussions between the Court and counsel for the parties with respect to their respective contentions and the proofs to be offered. At the conclusion of those discussions, recognizing the necessity for proofs justifying the compromise and settlement as being for the best interests of the L. A. Young Spring & Wire Corporation and its stockholders, the Court said (T. 151):

> "And the attorneys for the plaintiffs having furnished whatever offer they wish to make in order to sustain their judgment, then of course it follows, that the parties who are in here on an order to show cause shall have the right to meet that proof and go as far as they desire to establish that the compromise should not be accepted."

At the conclusion of the hearing the Court found:

> "The objectors (Benjamin E. Cohen, et al.)

offered no substantial evidence to support their claim that the best interests of the stockholders required that the offer of compromise be rejected. They were afforded every opportunity to submit proofs and all the witnesses they requested appeared voluntarily. * * * The attorneys for the plaintiffs and defendant L. A. Young cooperated with the attorneys for the objectors in every way and furnished all the information requested very promptly." (T. 88).

THE JUDGMENT OF THE DISTRICT COURT

On July 27th, 1942, the District Court made and filed findings of fact and conclusions of law (T. 87-93) determining that L. A. Young was insolvent and that the compromise and settlement was for the best interests of the corporation and its stockholders. All of the material facts and issues are set forth in the findings and conclusions and stated in detail and with accuracy. On August 13th, 1942, the final judgment and decree approving the compromise was entered (T. 94). On the same date the petition for intervention was denied on the merits and not for lack of jurisdiction (T. 93).

THE DECISION ON THE SECOND APPEAL

Benjamin E. Cohen again appealed and the Appellate Court affirmed the judgment and decree of the District Court in all respects.

In its *Per Curiam* opinion entered April 21st, 1943, the Circuit Court of Appeals said in part (T. 428):

> "It appears from the record presented on the present appeal by Benjamin E. Cohen that the District Court has complied in all particulars with the former mandate of this court, has received and considered all evidence proffered, and has given appellant a full and fair hearing; and it further appears from the entire record that the findings of fact recorded by the District Court are supported by substantial evidence, and that the conclusions of law drawn therefrom by the District Court are correct."

After two hearings in the District Court and the Sixth Circuit Court of Appeals Petitioner now seeks to have the case reviewed by this Court.

ARGUMENT

There are no special or important reasons for allowance of the writ. No federal question is involved. There is no question of conflict of the decision of the Circuit Court of Appeals with applicable decisions of any other courts, local or federal, or of the Supreme Court. There is no departure from the accepted or usual course of judicial proceedings which calls for the exercise of this Court's power of supervision. The questions presented are all questions of fact or of broad discretion.

PETITIONER'S REASONS FOR ALLOWANCE OF THE WRIT ARE WITHOUT MERIT

The reasons stated in petition for allowance of the writ have no basis in fact or law. The valuation of the securities involved at the market price was not in conflict with decisions of other circuits.

The valuation pertinent to the issue before the Court was the price which a judgment creditor could reasonably expect to obtain on execution sale of the assets or on liquidation. That was the price the public would be willing to pay at a public offering and accordingly the market price. In *Borg v. International Silver Company*, 11 Fed. (2) 147, it is said:

> "The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious. It presupposes, first, that book value can be realized on liquidation which is practically

> never the case; and, second, that liquidation values are a measure of present values. Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw little light. When all is said value is nothing more than what people will pay for shares, given as wide an opportunity for bidders to come in as is reasonably possible."

As was said in *U. S. v. Reading Company*, 295 Fed. 551:

> "There are two kinds of values, intrinsic and market. * * * There is often a wide difference between intrinsic value and market value. So great is this difference that intrinsic value is not admissible in evidence as indicating what a commodity should sell for at a specified time under particular circumstances if bona fide market value can be established. 'The intrinsic value of stock is not only not an infallible guide to its price in the market, but is, in fact, no guide at all'."

The petition to intervene was properly denied. The attorneys who presented the petition were present and participated in the hearings in behalf of Benjamin E. Cohen and others. They could not have done more in opposing approval of the compromise if the petition had been granted. The rights of the petitioners as stockholders were in no way impaired or adversely affected by the denial of the petition. There was no abuse of discretion in denying the petition under the circumstances involved and the decision of that issue is not in conflict in any respect with decisions of other courts.

The other reasons stated in the petition are based upon inaccurate assumptions and misstatements of fact and law not sustained by the record. The statement in para-

graph 3 that Young met each of his obligations at their respective maturities is not true. The undisputed evidence was that his past due obligations totaled $744,163.39. The statement at the top of page 3 of the petition that the case was compromised for $275,000 is another example of misstatement of facts, deliberately made and not sustained by the record. The statements and conclusions in paragraphs 4, 5, 6, 7 and 8 are inaccurate and not deserving of any consideration.

CONCLUSION

The District Court and the Circuit Court of Appeals, after considering all of the contentions and theories advanced by petitioner, approved the compromise and settlement. The record fully sustains the judgment of both Courts. There is nothing in the case which merits review by this Court and the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 11, 1944

Mr. C. Elmore Cropley,
Clerk,
United States Supreme Court,
Supreme Court Building,
Washington, D. C.

Dear Sir:

In Re: Benjamin K. Cohen, et al,
Petitioners,
vs.
Isaac C. Forcheimer,
Plaintiff & Respondent,
Leonard A. Young, et al,
Defendants & Respondents,
Lucille K. Levy, et al,
Intervenors & Respondents

We are counsel for L. A. Young Spring & Wire Corporation, Leonard A. Young, Alice D. Coffin and Charles M. Young, Defendants and Respondents. We have received this date a copy of a Brief in Behalf of Isaac C. Forcheimer, Plaintiff and Respondent, in Opposition to Petition for Writ of Certiorari which has been filed in the Supreme Court by Benjamin K. Cohen, et al, in the above entitled cause.

We believe that such brief amply supports the contention that the Writ of Certiorari should be denied and we fully concur in it in behalf of our clients. We had prepared a brief in opposition to the Petition but, as we are satisfied that the brief which has been filed fully covers the matter, we shall not file our brief in the cause.

We are supplying extra copies of this letter and we would greatly appreciate it if you would be so kind as to call the Supreme Court's attention to the fact that we concur in the brief of Isaac C. Forcheimer, Plaintiff and Respondent, and join in the request that the Petition be denied.

We are not certain if your practice permits this informal notice by letter of our concurrence. Should this letter not be sufficient under your practice to inform the Supreme Court of our position, please advise us as to its requirements.

We are sending copies of this letter to all counsel in the cause as per the enclosed transmittal letter.

Yours very truly,

COOK, SMITH, JACOBS & BEAKE

By
Grant L. Cook

GLC:E